ORIGINAL

NO. 84-1531

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

STATE OF MICHIGAN

Petitioner,

v.

ROBERT BERNARD JACKSON

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

AFFIDAVIT

PROOF OF SERVICE

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATE APPELLATE DEFENDER OFFICE

James R. Neuhard (P18253)
Defender

James Krogsrud (P28406)
Assistant Defender
Third Floor, North Tower
1200 Sixth Avenue
Detroit, Michigan 48226
(313) 256-2814

Counsel for Respondent

Dated: April 18, 1985

NO. 84-1531

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

STATE OF MICHIGAN

Petitioner,

v.

ROBERT BERNARD JACKSON

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent, **ROBERT BERNARD JACKSON**, who is now held in the Prison for Southern Michigan, asks leave to file the attached Brief in Opposition to a Petition for a Writ of Certiorari to the Supreme Court of the State of Michigan (without prepayment of costs) and to proceed in forma pauperis pursuant to Rule 46.

The respondent's affidavit in support of this motion is attached hereto. Respondent has been represented by appointed counsel for all post-conviction proceedings. See attached Order.

JAMES R. NEUHARD (P18253)
Defender

JAMES KROGSRUD (P28406)
Assistant Defender
Third Floor, North Tower
1200 Sixth Avenue
Detroit, Michigan 48226
(313) 256-2814

Counsel for Respondent

Dated: April 18, 1985

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

S.J.S.M. Spring Arbor College
Jackson, Michigan 49204 $ 70.00

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

---

2. Have you received within the past twelve months any income from any of following sources?

a. Business, profession or form of self-employment?

Yes ___ No ✓

b. Rent payments, interest or dividends?

Yes ___ No ✓

c. Pensions, anuities or life insurance payments?

Yes ___ No ✓

d. Gifts or inheritances?

Yes ___ No ✓

e. Any other sources?

Yes ___ No ✓

If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

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3. Do you own any cash or checking or savings account?

Yes ✓ No ___ (Include any funds in prison accounts.)

If the answer is yes, state the total value of the items owned.

$ 73.50

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Yes ___ No ✓

If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support

None

I understand that a false statement or answer to any question in the affidavit will subject me to penalties for perjury.

Robert Bernard Jackson

ROBERT BERNARD JACKSON

SUBSCRIBED AND SWORN TO before me,
this ___ day of _____, 1985

APR 03 1985

Julia Fabbri

Notary Public, _____ County,
Michigan
My Commission Expires:

FREDERICK T. SPALLA, JR.
Notary Public, Jackson County, MI
My Commission Expires June 3, 1987

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

FILED
JAMES R. KILLEEN
WAYNE COUNTY CLERK
MAR 19 1980
By J Borahan

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff

v

No. 79 928-559 FH

Robert Bernard Jackson
Defendant

ORDER ~~DENYING~~ APPOINTING APPEAL COUNSEL AND PROVIDING FOR TRIAL TRANSCRIPT

At a session of said court held in the Wayne County Court Building in the City of Detroit on 19th of March 1980.

PRESENT Honorable Horace W. Gilmore
Circuit Judge

Upon reading and filing the defendant's petition alleging that he is financially unable to retain appellate counsel to represent him and is unable to furnish counsel with the portion of the record that counsel requires to prepare postconviction motions and to perfect an appeal, IT IS ORDERED:

☐ That the defendant's request for appellate counsel is hereby denied.

☒ That for the purpose of appeal of this case to the Court of Appeals, State Appellate Defender, attorney at law, is hereby appointed appellate counsel for the defendant.

☒ That Elizabeth Horn, court stenographer, furnish to counsel the portion of the trial transcript requested by counsel for postconviction motions and the perfection of an appeal, and that the stenographer be compensated for the transcript as provided by law.

Jury Trial
Started 11/15/79

Horace W. Gilmore
Circuit Judge

Approved by the
State Court Administrator

Form No. C-101 Rev. 12/77

NO. 84-1531

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

STATE OF MICHIGAN

Petitioner,

v.

ROBERT BERNARD JACKSON

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

STATE APPELLATE DEFENDER OFFICE

James R. Neuhard (P18253)
Defender

James Krogsrud (P28406)
Assistant Defender
Third Floor, North Tower
1200 Sixth Avenue
Detroit, Michigan 48226
(313) 256-2814

Counsel for Respondent

Dated: April 18, 1985

COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE MICHIGAN SUPREME COURT'S JUDGMENT REVERSING RESPONDENT'S CONVICTION WAS BASED ON THE ADEQUATE AND INDEPENDENT STATE GROUNDS, I.E., A VIOLATION OF STATE PROMPT ARRAIGNMENT STATUTES, THUS THE POST-ARRAIGNMENT RIGHT TO COUNSEL ISSUE WAS REACHED ONLY BECAUSE IT WAS NECESSARY FOR A COMPANION CASE?

II. WHETHER THIS CASE DOES NOT PRESENT AN APPROPRIATE VEHICLE FOR DECIDING HOW THE SIXTH AMENDMENT APPLIES TO POST-ARRAIGNMENT INTERROGATION GIVEN THE VOLUMINOUS RECORD IN THIS CASE AND THE MOOTNESS OF THE QUESTION INVOLVED?

III. WHETHER THE DECISION OF THE MICHIGAN SUPREME COURT TO SUPPRESS RESPONDENT'S POST-ARRAIGNMENT CONFESSION WAS BASED ON ADEQUATE AND INDEPENDENT STATE GROUNDS, SPECIFICALLY, A NEW STATE RULE DEVELOPED BY ANALOGY TO FEDERAL LAW?

IV. WHETHER THE MICHIGAN SUPREME COURT ACCURATELY INTERPRETED FEDERAL CONSTITUTIONAL PRINCIPLES IN ESTABLISHING A NEW STATE RULE GOVERNING POLICE INTERROGATION PRACTICES AFTER AN ACCUSED HAS REQUESTED COUNSEL AT ARRAIGNMENT?

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COUNTERSTATEMENT OF THE CASE

Respondent adopts the Facts as set out in the opinion of the Michigan Supreme Court. Slip Opinion, 3-5, 21-25. See Petitioner's Appendix, 45-50, 89-100.

REASONS FOR DENYING THE WRIT

I. THE MICHIGAN SUPREME COURT'S JUDGMENT REVERSING RESPONDENT'S CONVICTION WAS BASED ON THE ADEQUATE AND INDEPENDENT STATE GROUNDS, I.E., A VIOLATION OF STATE PROMPT ARRAIGNMENT STATUTES, THUS THE POST-ARRAIGNMENT RIGHT TO COUNSEL ISSUE WAS REACHED ONLY BECAUSE IT WAS NECESSARY FOR A COMPANION CASE.

In this case, the Michigan Supreme Court ruled that the last 4 of 7 statements should not have been admitted into evidence in Respondent's state trial. Although the 7th statement was made after arraignment, the last 4 were obtained as a result of police tactics in delaying arraignment. In Part IV of their opinion, the Michigan Supreme Court relied exclusively on State law to suppress Respondent's pre-arraignment and post-polygraph statements. The Court stated:

> "Although the police had sufficient probable cause to obtain a warrant for defendant Jackson's arrest as a result of codefendant Knight's statements, they did not do so. Defendant was 'arrested' on the murder charges on Tuesday, July 31, at 2 p.m. when he was turned over to the Livonia police. Since defendant was arrested for a felony without a warrant, the arresting officers were required to bring him before a magistrate for arraignment without unnecessary delay. MCL 764.13; MSA 28.871(1); MCL 764.26; MSA 28.885;[1] People v

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1/ "A peace officer who has arrested a person for a felony offense without a warrant must without unneces-sary delay, take the person arrested before the most convenient magistrate of the county in which the offense was committed,

(Footnote Continued on Next Page)

Mallory, ___ Mich ___; ___ NW2d ___ (1984) (slip op, p 5); People v White, 392 Mich 404, 424; 221 NW2d 357 (1974), cert den sub nom Michigan v White, 420 US 912; 95 S Ct 835; 42 L Ed 2d 843 (1974)." Slip Opinion, 21. See Petitioner's Appendix, 90.

• • •

> "The delay was used as a tool to extract the three post-polygraph statements. Sergeants Ericson, Hoff, and Garrison all testified that they asked defendant to submit to a polygraph so that they could determine whether he was telling the truth. Although they did not specifically instruct the examiner to obtain a statement, Sergeant Hoff testified that they had hoped to obtain another statement if defendant's original confession proved inaccurate. The police were obviously attempting to strengthen their case against all four defendants, particularly White, who had not yet confessed to any involvement. The three post-polygraph confessions therefore were not admissible." Slip Opinion, 25. See Petitioner's Appendix, 99-100.

Petitioner admits that "the Michigan Supreme Court held that the fourth, fifth and sixth statements were obtained as a result of the violation of a state 'prompt arraignment' statute." Petition, pp 12-13. However, Petitioner asserts that this Court should accept this case for review because the Michigan Supreme Court found a separate ground for suppressing the seventh and last of Respondent's statements. Petition, p 13.

In 1960, based on State statutes, see fn 1, and the State constitutional guarantee of due process, then Mich Const 1908,

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> and must make before the magistrate a complaint, stating the offense for which the person was arrested." MCL 764.13; MSA 28.871(1).
>
> "Every person charged with a felony shall, without unnecessary delay after his arrest, be taken before a magistrate or other judicial officer and, after being informed as to his rights, shall be given an opportunity publicly to make any statement and answer any questions regarding the charge that he may desire to answer." MCL 764.26; MSA 28.885.

art 2, § 16; now Mich Const 1963, art 1, § 17, Michigan became the first State to adopt an exclusionary principle similar to that announced in McNabb v United States, 318 US 332; 63 S Ct 608; 87 L Ed 819 (1942). People v Hamilton, 359 Mich 410, 411; 102 NW 2d 738 (1960). Following the rationale of McNabb, the Michigan Supreme Court held inadmissible statements made during detention where arraignment had been delayed for the purpose of obtaining a confession. People v Hamilton, supra. See also, People v Harper, 365 Mich 494, 502-503; 113 NW 2d 808 (1962); People v Farmer, 380 Mich 198; 156 NW 2d 504 (1968); People v White, 392 Mich 404, 424, 221 NW 2d 457 (1974).

It is readily apparent that the Michigan Supreme Court's separate ground for suppression of the last confession, see Parts I-III, was an additional ground which the Court needed to reach only for the companion case, People v Rudy Bladel, Mich S Ct No. 69749. All four of Respondent's confessions suppressed were obtained while police unreasonably delayed Respondent's arraignment. Although it is difficult to imagine how the occurrence of an arraignment before the seventh and last confession would cure the unreasonable delay, if such an argument were to be made it must be on state grounds and in the state courts. Therefore, this Court should deny the Petition for Writ of Certiorari because the decision of the Michigan Supreme Court to reverse Respondent's case was "alternatively based on bona fide separate, adequate, and independent grounds." Michigan v Long, ___ US ___; 103 S Ct ____; 77 L Ed 2d 1201, 1214 (1983).

Finally, if this Court remains troubled by the question of federal jurisdiction, Respondent urges that this Court follow the traditional presumption against taking jurisdiction. Lynch v New York, 293 US 52; 55 S Ct 16; 79 L Ed 191 (1934). But see, Michigan v Long, supra.

II. THIS CASE DOES NOT PRESENT AN APPROPRIATE VEHICLE FOR DECIDING HOW THE SIXTH AMENDMENT APPLIES TO POST-ARRAIGNMENT INTERROGATION GIVEN THE VOLUMINOUS RECORD IN THIS CASE AND THE MOOTNESS OF THE QUESTION INVOLVED.

The Michigan Supreme Court found the last four of Respondent's seven statements to be inadmissible in his state trial. The Petitioner now asserts in the Petition for Writ of Certiorari:

> "In their opinion, the Michigan Supreme Court held that the fourth, fifth, and sixth statements were obtained as a result of the violation of a state 'prompt-arraignment' statute. The Petitioner recognizes that this decision is not before this Honorable Court.
>
> • • •
>
> "Even though a re-trial of this respondent must be held, it is vital that this seventh statement be found to be admissible for the reason that in it, respondent admits that he was in fact the shooter, contrary to his earlier, admissible, statements. Thus, this petition presents a 'live' issue to this Honorable Court." (Petition for Writ, pp 12-13; emphasis added).

The record in Respondent's case includes more than 3800 pages of transcript. The hearing on Defendant's Motion to Suppress lasted seven (7) days and produced nearly 800 pags of transcript. It is incredulous that Petitioner now asks this Court to expend scarce federal judicial resources to review this case "even though a retrial of this respondent must be held". Assuming arguendo the substantiality of the single confession issue raised by Petitioner, this Court could certainly find a more appropriate vehicle to resolve the issue.

III. THE DECISION OF THE MICHIGAN SUPREME COURT TO SUPPRESS RESPONDENT'S POST-ARRAIGNMENT CONFESSION WAS BASED ON ADEQUATE AND INDEPENDENT STATE GROUNDS, SPECIFICALLY, A NEW STATE RULE DEVELOPED BY ANALOGY TO FEDERAL LAW.

In Respondent's case, the Michigan Supreme Court did not rely solely on the Federal Constitution to make its decision. Instead, the Court based its decision on the State and Federal Constitutions, analogizing to federal principles. In the opening paragraph of their decision, the Michigan Supreme Court stated:

> "The common issue presented in these appeals is whether statements obtained after a defendant has requested appointment of counsel at arraignment are admissible pursuant to the principles enunciated in Edwards v Arizona, 451 US 477; 101 S Ct 1880; 68 L Ed 2d 378 (1981), and People v Paintman, 412 Mich 518; 315 NW 2d 418 (1982), cert den 456 US 995; 102 S Ct 2280; 73 L Ed 2d 1292 (1982)." Slip Opinion, p 1; (Emphasis added). See Petitioner's Appendix, 40.

After reviewing analagous cases from other jurisdictions, both state and federal, the Michigan Supreme Court stated their holding as follows:

> "We need not decide at this time whether stricter procedural standards for waiver of the Sixth Amendment right to counsel are required. We need only hold that at a minimum, the Edwards/Paintman rule applies by analogy to those situations where an accused requests counsel before the arraigning magistrate." See Petitioner's Appendix, 82-83.
>
> • • •
>
> "We have merely extended the Edwards/Paintman rule by analogy to cases involving requests for counsel during arraignment, on the basis of our interpretation of both the Sixth Amendment right to counsel and its state constitutional counterpart embodied in Const 1963, art 1, § 20." (Emphasis by Court). See Petitioner's Appendix, 88.

The Michigan Supreme Court's analogy to the Federal Constitution and federal cases does not establish that that Court based its decision solely on the Federal Constitution. Since a

great deal of litigation concerning right to counsel issues has been in the federal courts, it would have been strange if the Michigan Supreme Court had not considered the federal decisions by analogy. Moreover, the Michigan Supreme Court stated unequivocally that the "basis" for decision "by analogy" was their interpretation of the Federal and State Constitutions. The Court did not hold the interrogation violative of the Federal Constitution, nor did the Court state that they were following any decision of another jurisdiction. Thus, the Michigan Court has established a new State judicial rule governing police conduct based on the State Constitution.

If there is any doubt as to whether the Michigan Supreme Court intended to establish adequate and independent state grounds, Justice Ryan (dissenting) settled the issue by stating his objection to the Court's holding based on the State Constitution. Justice Ryan stated:

> "I concur in part III-C of my brother Cavanagh's opinion with the exception, however, that since the Edwards/Paintman ruling derives from an analysis of the United States Constitution, I find it unnecessary and, indeed, inappropriate to base the result in these cases upon [Michigan] Const 1963, art 1, § 20." See Petitioner's Appendix, 122.

IV. THE MICHIGAN SUPREME COURT ACCURATELY INTERPRETED FEDERAL CONSTITUTIONAL PRINCIPLES IN ESTABLISHING A NEW STATE RULE GOVERNING POLICE INTERROGATION PRACTICES AFTER AN ACCUSED HAS REQUESTED COUNSEL AT ARRAIGNMENT.

The State and Federal Constitutions both guarantee the right to counsel. Mich Const 1963, art 1, § 20; US Const, Ams VI, XIV. The purpose of the constitutional right to counsel is to provide the accused with legal assistance during the critical stages[2/] of the criminal process. See, e.g., Brewer v Williams,

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2/ There is little doubt that each of no less than seven (7) interrogation sessions were a critical stage in the

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430 US 387, 398; 97 S Ct 1232; 51 L Ed 2d 424 (1977); Powell v Alabama, 287 US 45; 57; 53 S Ct 55; 77 L Ed 158 (1932). This constitutional right has been afforded as a protection for the individual from the awesome power of the government. Police authorities should not be permitted to subvert the intent of our founding documents by hypertechnical interpretations of its guarantees.

There is no serious disagreement among legal authorities that the right to counsel attaches no later than at arraignment. See e.g., Kirby v Illinois, 406 US 682, 688-690; 92 S Ct 1877; 32 L Ed 2d 411 (1972). See also, People v Anderson, 389 Mich 155, 171-172; 205 NW 2d 401 (1973) [right to counsel at pre-indictment identifiction procedures]. Once the State has commenced criminal proceedings and the accused has requested counsel, the constitution forbids all efforts by the State to elicit incriminating information from the accused. United States v Henry, 447 US 264; 100 S Ct 2183; 65 L Ed 2d 115 (1980); Massiah v United States, 377 US 201; 84 S Ct 1199; 12 L Ed 2d 246 (1964).

There is no dispute that Robert Jackson formally requested the appointment of counsel at his arraignment. In addition to violating Jackson's constitutional privilege against self-incrimination, the post-arraignment int rrogation violated his right to counsel. Because "the policies underlying the two

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> prosecution of Robert Jackson. The police were not merely investigating an unsolved crime, Jackson had become the accused and the purpose of the interrogation was to "persuade" him to confess despite his constitutional right not to do so. "It would exalt form over substance to make the right to counsel . . . depend on whether at the time of the interrogation, the authorities had secured a formal indictment. Petitioner had, for all practical purposes, already been charged with murder." Escobedo v Illinois, 378 US 478, 486; 84 S Ct 1758; 12 L Ed 2d 977 (1964).

constitutional protections are quite distinct," Rhode Island v Innis, 446 US 291, 300, fn 4; 100 S Ct 1682; 64 L Ed 2d 297 (1980), an accused may waive his right to remain silent without waiving his right to counsel. Justice Marshall, dissenting, in Wyrick v Fields, 459 US 42; 103 S Ct 394; 74 L Ed 2d 213, 223 (1982), aptly described the high standard which the prosecution must meet to establish a waiver of the Sixth Amendment right to counsel:

> "To establish a waiver of the Sixth Amendment right to counsel, it is therefore not enough for the State i point to conduct - such as the initiation of a conversation - that demonstrates that the defendant's statements were made voluntarily. Since a Sixth Amendment violation does not depend upon coercion, the protection of the Sixth Amendment is not waived by conduct that shows only that a defendant's statements were not coerced. The State must show that the Defendant intelligently and knowingly relinquished his right not to be questioned in the absence of counsel. The State can establish a waiver only by proving '" an intentional relinquishment or abandonment"' of the right to have counsel present. Brewer v Williams, supra, 430 US at 404, 51 L Ed 2d 424, 97 S Ct 1232, quoting Johnson v Zerbst, 304 US 458, 464, 82 L Ed 1461, 58 S Ct 1019 (1938).
>
> "Given the different policies underlying the Fifth and Sixth Amendments, it is not surprising that a number of courts have held that '"[w]arnings by law enforcement officers and subsequent action by the accused that might suffice to comply with Fifth Amendment strictures against testimonial compulsion [do] not necessarily meet . . . the higher standard with respect to waiver of the right to counsel that applies when the Sixth Amendment right to counsel has attached."' United States v Mohabir, 624 F2d 1140, 1147 (CA 2, 1980), quoting United States v Massimo, 432 F 2d 324, 327 (CA 2, 1970) (Friendly J., dissenting) (majority did not reach the issue), cert denied, 400 US 1022; 27 L Ed 2d 633; 91 S Ct 586 (1971)." (footnotes omitted).

Practically speaking, when Robert Jackson exercised his right to counsel at arraignment, it is likely that his appreciation of

the value of counsel differed very little from when the Livonia Police advised him prior to arraignment. The magistrate did not expound on counsel's value, he simply noted that Jackson had petitioned for counsel. The reasonable conclusion to be drawn is not that Robert Jackson was exercising a mere formality. Jackson, as he had from the time of his arrest, was seeking every opportunity to preserve his freedom. When dependent upon police advice, the right to counsel, like the right to remain silent, was flim-flammed away by police who viewed this precious right as an obstacle to a deal. But when formally offered without the strings attached by police, the right to counsel was quite naturally embraced by Jackson.

Robert Jackson's formal request for counsel at arraignment was a request for the assistance of counsel against the "prosecutorial forces of organized society" in all forums and forms where the State would seek to incriminate and convict. The State should not be permitted to circumvent this unequivocal request in open court by merely extending the same stationhouse Miranda advice which the Livonia Police could so neatly explain away in subsequent discussions about what these rights "really mean" to the defendant. The police should not be the ones[3/] who say whether an accused has waived a right asked for and given in open court, which they think stands between them and wrapping up a confession. Logically, a post-arraignment waiver of counsel should not valid unless done after consultation with counsel or after proper inquiry pursuant to Faretta v California, 422 US 836; 95 S Ct 2525; 45 L Ed 2d 562 (1975).

3/ "Sed quis custodiet ipsos Custodes?." (But who is to guard the guards themselves?) Decimus Junius Juvenal. c. 50-130 A.D.. Barlett, J.. Familiar Quotations, p 139.

Under any recognized standard the prosecution cannot establish a valid waiver of Robert Jackson's right to counsel. The Michigan Supreme Court accurately interpreted federal constitutional principles in reaching their decision by analogy. The new Michigan rule now requires police to adhere to at least the same safeguards formulated in Edwards v Arizona, 451 US 477; 101 S Ct 1880; 68 L Ed 2d 378 (1981) and its progeny. Assuming arguendo that the Michigan Court did not establish a new State rule, this Court need not review a case which accurately interprets federal principles.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the petition for a writ of certiorari.

Respectfully submitted,

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